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Supreme Court U.S.
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NO. 02-484

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

CAPITAL CASE

WILLIAM VAN POYCK,
Petitioner,

v.

MICHAEL M. MOORE,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Eleventh Circuit

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SUPRPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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LIST REQUIRED BY RULE 29.6

Pursuant to this Court's Rule 29.6, Petitioner hereby incorporates by reference the disclosure made in his Petition for Writ of Certiorari.

ARGUMENT

This supplemental brief is submitted by petitioner William Van Poyck, pursuant to Supreme Court Rule 15.8, respectfully requesting that this Honorable Court hold in abeyance its decision on Van Poyck's petition for certiorari until the resolution of the matter captioned *Kevin Wiggins v. Thomas R. Corcoran*, Supreme Court Case No. 02-311. As grounds for this request, Van Poyck states the following:

Subsequent to the filing of Van Poyck's Petition for Writ of Certiorari, this Court granted certiorari review of the second question presented by the petitioner in *Wiggins*:

> Does defense counsel in a capital case violate the requirements of *Strickland v. Washington* by failing to investigate available mitigation evidence that could well have convinced a jury to impose a life sentence, as this Court concluded in *Williams v. Taylor* and as most Courts of Appeals have concluded, or is defense counsel's decision not to investigate such evidence "virtually unchallengeable" so long as counsel knows rudimentary facts about the defendant's background, as the Fourth Circuit held in this case.

Petition for a Writ of Certiorari, *Wiggins v. Corcoran*, Case No. 02-311 ("Wiggins Petition") at 1; Order Granting Certiorari (November 18, 2002). Wiggins argues that trial counsel's failure to investigate or present evidence on Wiggins' background during sentencing constitutes ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Wiggins Petition at 8-9. Wiggins' trial counsel chose only to "retry guilt," arguing that someone other than Wiggins committed the murder in question. *Id.*

The Fourth Circuit rejected Wiggins' Petition for Writ of Habeas Corpus, stating that the performance prong of *Strickland* "is highly deferential to counsel's choices, and informed strategic decisions are virtually unchallengeable" so long as "counsel have some knowledge about potential avenues of mitigation on behalf of a client in order to make a decision that can be fairly characterized as a reasonable strategic choice." *Wiggins v. Corcoran*, 288 F.3d 629, 640, 641 (4th Cir. 2002). Wiggins is contending that this decision conflicts with the standard set forth in the vast majority of circuits,[1] and with the standard set forth by this Court in *Williams v. Taylor*, 529 U.S. 362 (2000).

The questions raised by Wiggins concerning the obligation of counsel to conduct a pre-sentence investigation as to mitigating circumstance are the same as those presented by Van Poyck in question two of his petition. Like in *Wiggins*, trial counsel for Van Poyck totally failed to investigate crucial mitigating factors prior to the penalty phase – in particular, the horrendous events of Van Poyck's childhood, his mental health, and evidence showing that he was not the triggerman (evidence conclusive enough to later prompt the Florida Supreme Court to find that Van Poyck was guilty only of felony murder). Van Poyck Petition at 7-12.

The Eleventh Circuit, like the Fourth Circuit in *Wiggins*, nonetheless denied Van Poyck's Petition for Writ of Habeas Corpus, stating that a petitioner cannot receive *Strickland* relief unless he or she can "establish that no objectively competent

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[1] Wiggins argues that the Fourth Circuit is inconsistent with the Eleventh Circuit, citing that court's pre-*Williams* decisions in *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) and *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991). They do not consider, however, the Eleventh Circuit's decision in this case or in *U.S. v. Chandler*, 218 F.3d 1305 (11th Cir. 2000), discussed *infra*.

lawyer would have taken the action that his lawyer did take." *Van Poyck v. Moore*, 290 F.3d 1318 (11th Cir. 2002). In holding as such, the Eleventh Circuit reiterated its pre-*Williams* determination that a lawyer's tactical decisions are "virtually unchallengeable" – the identical language used by the Fourth Circuit in *Wiggins* and which, as noted above, forms the basis for the question on which this Court has granted certiorari review. *Van Poyck*, 290 F.3d at 1322 (citing *Bolender v. Singletary*, 16 F.3d 1547, 1557 (11th Cir. 1994)). The Eleventh Circuit also relied upon its decision in *U.S. v. Chandler,* in which it held that *Strickland* relief cannot be granted if "some reasonable lawyer at trial could have acted in the circumstances, as defense counsel acted at trial." *U.S. v. Chandler*, 218 F.3d at 1314. As the dissenting judge in *Chandler* predicted, that standard has functionally foreclosed *Strickland* claims in the Eleventh Circuit. *Id.* at 1361 (Wilson, J. dissenting).

The Fourth and Eleventh Circuit standards are essentially the same, and suffer from the same, fatal flaw – they are so deferential to trial counsel "decisions" not to conduct sentencing investigations so as to, as a practical matter, nullify *Strickland* and *Williams* altogether. The standard the Court articulates in *Wiggins* will control in this matter; indeed, should this Court reverse the Fourth Circuit in *Wiggins*, a summary reversal of the Eleventh Circuit's decision would likely be appropriate. *See, e.g., Keney v. New York*, 388 U.S. 440 (1967) (mem) (summarily reversing based on decision issued by the Court on same date in another case). This matter should thus be held in abeyance so that its ultimate disposition is based on, and guided by, the proper Constitutional standards to be determined by this Court in *Wiggins*. At the very least, to rule otherwise would "tip the Court's hand" as to its ultimate decision in *Wiggins*. *Straight v. Wainwright*, 106 S.Ct. 2004, 2005 n. 2 (1986) (mem.) ("the Court often 'holds' cases for reasons that have nothing to do with the merits of the cases being held, as

when we wish not to 'tip our hand' in advance of an opinion's announcement.").

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Van Poyck's original Petition, Van Poyck requests that the his petition be held in abeyance until the Court reaches a decision in *Wiggins*.

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